FILE COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1946.

No. 1077

PACIFIC ELECTRIC RAILWAY COMPANY, a corporation,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit and Brief in Support Thereof.

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Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

To the Honorable, Fred M. Vinson, Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Your petitioner respectfully shows:

Statement of Matter Involved.

This case involves a claim for refund of taxes paid by petitioner under the Carriers' Taxing Act of 1937 and Subchapter B of Chapter 9 of the Internal Revenue Code, on one-half the compensation paid to employees engaged in bus operations designated as Los Angeles Motor Coach Lines.

Petitioner Pacific Electric Railway Company is a California corporation. [R. 53.] It now is, and at all times since January 1, 1937, has been, a common carrier en-

gaged in the transportation of passengers and property for hire by rail and motor coach in Los Angeles and adjacent territory; is an "employer" as defined in the Railroad Retirement Act of 1937, and the Carriers' Taxing Act of 1937, now Subchapter of Chapter 9 of the Internal Revenue Code; and is and was subject to the provisions of those statutes. [R. 55.] The Los Angeles Railway Corporation, a California corporation hereinafter called "Los Angeles Railway" is a street railway and as such has not been and is not now an "employer" subject to the Railroad Retirement Act, Carriers' Taxing Act of 1937 or Subchapter B of Chapter 9 of the Internal Revenue Code. Instead, Los Angeles Railway is subject to the provisions of Subchapter A of Chapter 9 of the Internal Revenue Code, which originated as Title VIII of the Social Security Act and is now known as the "Federal Insurance Contributions Act." [R. 55.] Thus, petitioner is subject to tax in connection with a plan of benefits for employees of railroads, whereas Los Angeles Railway is subject to tax under a plan for the benefit of persons employed by employers who are not railroads.

At all times since January 1, 1937, petitioner and Los Angeles Railway have operated certain motor coach routes in Los Angeles and adjacent territory for the transportation of passengers in intrastate commerce only. [R. 54.] For purpose of identification these operations are presently carried on under the name "Los Angeles Motor Coach Lines" and were previously carried on under the name "Los Angeles Motor Coach Company" and "Los Angeles Motor Bus Company", respectively. [R. 53-54.] None of these is or ever has been a corporation and the operations are conducted pursuant to certificates of public

convenience and necessity issued by the Railroad Commission of the State of California to petitioner and Los Angeles Railway authorizing these operations under an agreement dated August 15, 1923, between petitioner and Los Angeles Railway. [R. 54-55.]

The agreement of August 15, 1923 under which the operations have at all times been conducted appears in full at pages 17-21 of the record.

These operations are conducted by petitioner's president and the president of Los Angeles Railway, as managing directors representing their respective companies, through a manager, an assistant manager, a superintendent of equipment and other subordinate officers and employees. The Los Angeles Motor Coach Lines, as such, has no officers. Petitioner and Los Angeles Railway, through their respective presidents, regulate the conditions of employment and dismiss employees in the Los Angeles Motor Coach Lines service. [R. 56.] The employees charged with the supervision and management of these operations are directly responsible to the general manager who in turn reports directly to the managing directors by whom he is appointed. The general manager, together with his supervisory staff, has general charge of the operations, but all matters of a controversial nature, or which in any way might conflict with the exclusive interests of petitioner or Los Angeles Railway, and all matters involving important questions of policy are determined by agreement between the managing directors. [R. 64-65.]

The accounting and auditing work in connection with these operations is performed by the accounting department of Los Angeles Railway. The law, claim, purchas-

ing and traffic work is performed by petitioner through its officers and departments regularly performing such work exclusively for petitioner. Employees engaged in the Los Angeles Motor Coach Lines service are accorded medical treatment and hospitalization by the hospital department maintained by petitioner under the same terms, rules and regulations as govern the rendition of medical and hospital service to the sole employees of petitioner. [R. 65.] Tariffs naming local one-way, round-trip and commutation fares between points on lines operated under the name, Los Angeles Motor Coach Lines, and joint fares between points on the lines of petitioner and Los Angeles Railway are issued by the traffic manager of petitioner, and duly posted, published and on file with the Railroad Commission of the State of California. [R. 66.]

The employees engaged in the Los Angeles Motor Coach Lines service, including the supervisory forces, are employed to work exclusively in this service and devote their entire time to it. [R. 65.]

Each company owns and furnishes approximately one-half of the equipment and facilities devoted to this service. Title to these facilities remains in the company furnishing them. [R. 64.] All revenues from the operation are deposited in a separate account identified with the operation and payment of all expenses in connection with the operation, including payrolls, are made from this special account. [R. 65.] The expense incurred in connection with the conduct of the operation is borne approximately in equal proportions by each company and each share in the revenues in the same ratio. [R. 64.]

Petitioner maintains its records in accordance with the Uniform System for Classification of Accounts as pre-

scribed by the Interstate Commerce Commission and includes in its report to the Interstate Commerce Commission its proportionate share of gross revenues and expenses, credited and charged to it in connection with the operation designated Los Angeles Motor Coach Lines. The Coach Lines items of revenue and expenses are included together with all other items of revenues and expenses under the appropriate item therefor in this classification. [R. 55-56.]

During the period January 1, 1937, to December 31, 1940, inclusive, petitioner paid employees and employers tax under the Carriers' Taxing Act of 1937 and Subchapter B of Chapter 9 of the Internal Revenue Code, on one-half of the total compensation paid to the employees engaged in the Coach Lines service. That portion of their compensation was charged to and borne by petitioner. Los Angeles Railway paid social security tax on the remaining one-half. [R. 63.] The carrier's tax paid by petitioner, refund of which is sought in this case, was for the period January 1, 1937 to December 31, 1940. The tax was $66,124.65 of which $33,062.45 was employer's contribution and $33,062.20 employees' contribution. The tax was paid upon one-half of the total compensation of employees engaged in the Coach Lines service. [R. 56-62.] A claim for refund was duly filed. [R. 24-32, 37-42.] The Commissioner of Internal Revenue disallowed the claims on the ground that the employees in Coach Lines service were joint employees of petitioner and Los Angeles Railway and not employees of Coach Lines as

a separate entity and thus the tax paid by petitioner on one-half of the compensation of such employees was proper. [R. 27-29.] This ruling was consistent with the ruling of General Counsel of the Railroad Retirement Board [R. 139-141 and 144-146] and of the Railroad Retirement Board. [R. 142-143.] This ruling, however, is contrary to decision of Appeals Council of the Social Security Board in a claim for Widow's Current and Children's Insurance Benefits under the Social Security Act in the cases of Katherine B. Garlow and Richard Floyd Garlow on account of the death of Floyd C. Garlow, former employee in Coach Lines service [R. 113-121] and the ruling of the California Employment Commission under the California Unemployment Insurance Act in the matter of Ned W. Schafer, claimant for unemployment benefits under the California Unemployment Insurance Act [R. 106-112] and findings and judgment of the Superior Court of the State of California, in and for the County of Los Angeles, in four actions brought for the refund of contributions paid by your petitioner under the California Unemployment Insurance Act account of one-half of the compensation paid to employees in Coach Lines service subsequent to July 1, 1939, the effective date of the Railroad Unemployment Insurance Act. [R. 122-136.]

For all periods since July 1, 1939, petitioner has paid on account of unemployment insurance for employees in Los Angeles Motor Coach Lines service contributions under the Railroad Unemployment Insurance Act on the basis of

one-half of the total compensation paid to said employees. For the same period Los Angeles Motor Coach Lines has been required to pay as an employer contributions based on the total compensation of said employees under the California Unemployment Insurance Act which is the state act for unemployment benefits as contemplated under Title IX of the Social Security Act, now Subchapter C of Chapter 9 of the Internal Revenue Code. [R. 128-129.] This case directly involves the refund of taxes paid under Subchapter B of Chapter 9 of the Internal Revenue Code, formerly the Carriers' Taxing Act of 1937.

The acts constituting that portion of the Social Security System applicable to employment by others than carriers do not apply to employment subject to those acts constituting that portion of the System applicable to employment by carriers. If petitioner is subject to the provisions of Subchapter B of Chapter 9 of the Internal Revenue Code, formerly the Carriers' Taxing Act of 1937, on account of motor coach employment, it is likewise subject to the Railroad Unemployment Insurance Act, and, therefore, such employment to the extent it is creditable to service for petitioner is not subject to Subchapter A of Chapter 9 of the Internal Revenue Code (Federal Insurance Contributions Act), Subchapter C of Chapter 9 of the Internal Revenue Code (Federal Unemployment Tax Act) or the California Unemployment Insurance Act, which constitute a part of the Social Security System applicable to employment by others than carriers.

Question Presented.

The question presented is whether petitioner properly reported and paid the employer and employee taxes under the Carriers' Taxing Act of 1937 and Subchapter B of Chapter 9 of the Internal Revenue Code on one-half the compensation of employees engaged in the operations designated as Los Angeles Motor Coach Lines. The answer depends upon the determination whether those employees are "employees" in the "employment" of petitioner within the provisions of the Railroad Retirement Act, Subchapter B of Chapter 9 of the Internal Revenue Code, formerly the Carriers' Taxing Act of 1937, and the Railroad Unemployment Insurance Act constituting the Social Security Plan applicable to employment by carriers, or whether those employees are "employees" of Los Angeles Motor Coach Lines, as an employing unit, separate and distinct from its constituent members, petitioner herein, and Los Angeles Railway, and, therefore, subject to Subchapter A of Chapter 9 of the Internal Revenue Code (Federal Insurance Contribution Act, formerly Title VIII of the Social Security Act), Subchapter C of Chapter 9 of the Internal Revenue Code (Federal Unemployment Tax Act, formerly Title IX of the Social Security Act) and of the California Unemployment Insurance Act.

Statement of Jurisdiction.

This Petition for Writ of Certiorari is filed under authority of Section 240(a) of the Judicial Code (28 U. S. C., Section 347(a)) and involves "an important question of federal law, which has not been, but should be, settled by this Court." (Supreme Court Rule 38, paragraph 5(b).)

Opinion of the United States Circuit Court of Appeals for the Ninth Circuit was rendered and filed on November 4, 1946 [R. 206-216], 157 F. (2d) 902, Advance Sheet No. 12. A Petition for Rehearing was duly filed and order denying Petition for Rehearing rendered by said Circuit Court of Appeals on the 5th day of December, 1946. [R. 217.] The Federal law directly involved is Subchapter B of Chapter 9 of the Internal Revenue Code (26 U. S. C., Secs. 1500-1538), formerly the Carrier's Taxing Act of 1937. The decision of the question will determine the status of employment under related Federal Acts, to-wit: the Railroad Retirement Act of 1937 (45 U. S. C., Sec. 228(a)), the Railroad Unemployment Insurance Act (45 U. S. C., Sec. 351), the Social Security Act (42 U. S. C., Secs. 401-410(a)), Subchapter A of Chapter 9 of the Internal Revenue Code (Federal Insurance Contributions Act) (26 U. S. C., Secs. 1400-1432), Subchapter C of Chapter 9 of the Internal Revenue Code (Federal Unemployment Tax Act) (26 U. S. C., Secs. 1600-1610), and the California Unemployment Insurance Act (Calif. Statutes 1935, Ch. 352 as amended) providing for unemployment taxes and benefits as contemplated by Federal Unemployment Tax Act.

Reasons Relied on for the Allowance of the Writ.

An important Federal question with respect to the application of Subchapter B of Chapter 9 of the Internal Revenue Code, formerly the Carriers' Taxing Act of 1937, to "employment" in a particular type of business organization is presented. This question has not been determined by this Court.

The question has arisen with various administrative agencies under the several acts, all of which are embraced within the Social Security System, including those applicable to employment by carriers. These various administrative agencies have reached different conclusions inconsistent with each other. Each will not recede from the position taken by it in the absence of a final court decision.

The following is a summary of the different determinations of this question by the several administrative agencies charged with the administration of the several acts embraced within the National Social Security System:

In a proceeding before the California Department of Employment on appeal before the California Employment Commission, Commission case No. 200, Appeals Bureau case No. R-444-1567-40 in the matter of Ned W. Shafer on the question of unemployment benefits, it was held that this employee in Los Angeles Motor Coach service was entirely subject to the Social Security System and was not subject to the Railroad Retirement Act. [R. 106-112.]

In a proceeding before the Federal Social Security Board, Office of Appeals Counsel, Decision of Appeals Counsel cases Nos. 12-32, 12-60, in considering the claim for widows current and children's insurance benefit in connection with the employment of Floyd C. Garlow, an em-

ployee in Los Angeles Motor Coach service, it was held that this employee was entirely subject to the Social Security System and not subject to the Railroad Retirement Act. [R. 112-121.]

Opposed to the foregoing decisions, the Railroad Retirement Board and the General Counsel of the Railroad Retirement Board has consistently ruled that one half of the wages of employees engaged in Los Angeles Motor Coach service are subject to the Carriers' Taxing, Railroad Retirement, and Railroad Unemployment Insurance Acts and must be reported and tax paid by Pacific Electric Railway Company as the "employer". [R. 139-146.]

The Commissioner of Internal Revenue, in rejecting the claims filed which form the basis of this proceeding, ruled that one-half of the wages paid to employees account of employment in the Los Angeles Motor Coach service were subject to the Railroad Retirement Act and Carriers' Taxing Act and had been properly reported and paid by petitioner as the "employer". [R. 27-29.]

The question has also been considered in two court proceedings. In this proceeding the United States District Court held that employees in Los Angeles Motor Coach service were not employees, either in whole or in part, of the petitioner herein within the provisions of the Carriers' Taxing Act of 1937 and the Railroad Retirement Act, but were entirely subject to the Social Security System applicable to employment by others than carriers. [R. 155-199.] The Circuit Court of Appeals reversed this decision and held that, to the extent of one-half of the wages of such employees, the Carriers' Taxing Act applied, holding in effect that such employees were to that extent in the

employment of petitioner within the scope of that act. [R. 205-217.]

In four cases in the Superior Court of the State of California it was held that employment in Los Angeles Motor Coach service was entirely subject to the California Unemployment Insurance Act and that such employment was neither in whole nor in part subject to the provisions of the Railroad Unemployment Insurance Act. The court in its decision, therefore, passed upon and rejected the administrative rulings of the Railroad Retirement Board and of the Commissioner of Internal Revenue upon a question of Federal law. [R. 122-138.] An appeal was taken from this judgment and the District Court of Appeal of the State of California affirmed the decision of the trial court, 166 P. (2d) 602. A rehearing was granted by that court and the case is now pending.

A determination of the status of employment in Los Angeles Motor Coach service under Subchapter B of Chapter 9 of the Internal Revenue Code, formerly the Carriers' Taxing Act of 1937, will determine the status of that employment under the Railroad Retirement Act and under the Railroad Unemployment Insurance Act. If by a final decision of this court that employment is held to be subject to those acts, it will of necessity be excluded from the provisions of Subchapters A and C of Chapter 9 of the Internal Revenue Code, the provisions of the Social Security Act providing for old age and death benefits and the provisions of the California Unemployment Insurance Act under which the State of California participates in the plan for unemployment insurance contemplated by the Federal Unemployment Tax Act.

Petitioner has, therefore, at all times reported and paid contributions on account of employment in Los Angeles Motor Coach service based upon one-half of the compensation paid to employees in that service under Subchapter B of Chapter 9 of the Internal Revenue Code and the Railroad Unemployment Insurance Act. By virtue of the administrative ruling of the California Employment Commission there has been paid on account of this same employment contributions under the California Unemployment Insurance Act which has been improperly paid and to which petitioner is entitled to refund if such employment is subject to tax under Subchapter B of Chapter 9 of the Internal Revenue Code and Railroad Unemployment Insurance Act. Old age benefits are paid under administrative rulings of the Railroad Retirement Board to retired employees from that service under the provisions of the Railroad Retirement Act based upon the one-half of the wages paid to such employees reported and upon which taxes were paid under the Carriers' Taxing Act. By virtue of rulings of the Railroad Retirement Board unemployment insurance benefits are paid to such employees on the same basis under the Railroad Unemployment Insurance Act. Under the ruling of the Appeals Counsel of the Federal Social Security Board death benefits are payable upon total compensation paid to a deceased employee in that service although at no time have taxes been exacted on such total compensation under the provisions of Subchapter A of Chapter 9 of the Internal Revenue Code.

As a result petitioner has been compelled to pay or caused to be paid certain taxes under both systems, although it is admitted that employment subject to the Social Security plan applicable to employment by carriers is not employ-

ment subject to the system applicable to employment by others than carriers.

Section 1426-b(9) of the Internal Revenue Code exempts from the Federal Insurance Contributions Act service performed by an individual as an employee as defined in Section 1532 of the Internal Revenue Code. Section 1607-c(9) of the Internal Revenue Code exempts from the provisions of the Federal Unemployment Tax Act service performed by an individual as an employee as defined in Section 1 of the Railroad Unemployment Insurance Act. Under Section 209(b)(9) of Title II Federal Social Security Act there is excluded from coverage service performed by an individual as an employee as defined in Section 1532 of the Internal Revenue Code. Under Section 7.5 of the California Unemployment Insurance Act, California Statutes of 1935, Chapter 352, as amended by Statutes of 1939, Chapter 169, the term "employment" does not include service performed after June 30, 1939 with respect to which unemployment compensation is payable under the Railroad Unemployment Insurance Act. Section 13-b of the Railroad Unemployment Insurance Act provides that payment of unemployment benefits for unemployment occurring after June 30, 1939, based upon employment as defined in that act shall be exclusive and that no state unemployment compensation law shall apply to such employment.

The confusion which has resulted from the several incompatible rulings will continue both as to the collection of taxes as well as to the payment of benefits until a final determination by the United States Supreme Court of the question presented.

Wherefore, your petitioner prays that a Writ of Certiorari issue under the seal of this Court directed to the Circuit Court of Appeals, for the Ninth Circuit, commanding said court to certify and send to this Court a full and complete transcript of record and of the proceedings of the said Circuit Court had in the case number and entitled on its Docket No. 11211, United States of America, Appellant, vs. Pacific Electric Railway Company, a corporation, Appellee, to the end that this cause may be reviewed and determined by this Court as provided for by the Statutes of the United States and that the judgment herein of said Circuit Court be reversed by the Court and for such further relief as to the Court may seem proper.

Dated: February 26, 1947.

C. W. CORNELL,
Attorney for Petitioner.

E. L. H. BISSINGER,
E. D. YEOMANS,
Of Counsel.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1946.

No. .....

PACIFIC ELECTRIC RAILWAY COMPANY, a corporation,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

The Opinion Below.

The opinion of the United States Circuit Court of Appeals for the Ninth Circuit is printed in full in the record. [R. 206-217.] The opinion is reported in Advance Sheet No. 12, 157 F. (2d) 902. The opinion of the United States District Court for the Southern District of California is printed in the record [R. 173-199] and is reported in 64 F. Supp. 796 (S. D. Cal.), May 9, 1945.

Jurisdiction.

The judgment to be reviewed was rendered and filed on November 4, 1946. A petition for rehearing was duly filed and order denying petition for rehearing was rendered by the Circuit Court of Appeals on December 5, 1946. [R. 217.]

The jurisdiction of this court is invoked under Section 240(a) of the Judicial Code (28 U. S. C., Sec. 347(a)). The Circuit Court of Appeals in this case decided an important question of federal law which has not been but should be settled by this court.

Statement of the Case.

There are no controversial issues of fact in this case. In the preceding petition for a writ of certiorari a summary statement of the matter involved has already been made (pp. 1 to 7), which statement is hereby adopted and made a part of this brief.

Specifications of Errors.

A. The United States Circuit Court of Appeals erred in holding that employees in Motor Coach Lines service were to the extent of and with respect to one-half of their aggregate compensation employees of the Pacific Electric Railway Company.

B. The court further erred in holding that such employment to the extent of and with respect to one-half of the compensation paid to employees therein was employment within the meaning of Subchapter B of Chapter 9 of the Internal Revenue Code, 26 U. S. C. A., Int. Rev. Code, Sections 1500-1537.

C. The court further erred in holding that the taxes involved in this case were properly collected.

Argument.

For convenient reference there is attached hereto an appendix wherein portions of the several statutes involved, consideration of which petitioner believes to be pertinent to the question presented in this case, are quoted.

This case involves the question whether employees in Los Angeles Motor Coach Lines service are employees of petitioner and of Los Angeles Railway Corporation or are employees of Los Angeles Motor Coach Lines as an "employer", separate and apart from its principals. If an employee in Los Angeles Motor Coach Lines service is in the "employment" of petitioner, such employment is subject to the special and separate Social Security System for the railroad industry. Employment subject to such Social Security System for the railroad industry is specifically exempt from tax under the Social Security System applicable to employment by others than carriers. The only question involved is as to which system applies to employment in Los Angeles Motor Coach Lines service and to what extent.

In *Magruder, Collector of Internal Revenue v. Baltimore Steam Packet Co.*, 144 F. (2d) 130, the Circuit Court of Appeals for the Fourth Circuit stated:

> "(1) Congress by the enactment of the Railroad Retirement Act, 45 U. S. C. A., §228a *et seq.*, the Railroad Unemployment Insurance Act, 45 U. S. C. A., §351 *et seq.*, and the Carriers Taxing Act of 1937, 26 U. S. C. A. Int. Rev. Code, §1532, 45 U. S. C. A., §261, set up a special and separate social security system for the railroad industry. The definition of employer and employee subject to each of these acts is identical in the three acts."

In *Northern Pac. Ry. Co. v. Reynolds,* Advance Sheet No. 5, 68 F. Supp. 492, District Court Minn., Third Division, in considering the classification of employees under these two system stated:

> "They cannot be within the scope of both schemes of legislation as they are mutually exclusive."

The collection of taxes under the Internal Revenue Code is delegated to the Collector of Internal Revenue. The collection of taxes and payment of benefits under the Railroad Unemployment Insurance Act is under the administration of the Railroad Retirement Board, which also administers the Railroad Retirement Act of 1937. The payment of old age and death benefits under the Social Security Act is under the administration of the Social Security Board. The collection of taxes and the payment of unemployment insurance benefits under the California Unemployment Insurance Act, although a part of the Federal Social Security System, is under the administration of the California Employment Commission. None of these several acts provide a method to determine the jurisdiction as between these different administrative agencies of the government.

Neither is there any provision whereby in a single judicial proceeding various inconsistent rulings of these several government agencies may be adjudicated. A determination, however, in this case by the United States Supreme Court will, in light of the specific exemption provisions contained in the Federal Social Security Act, the Federal Insurance Contributions Act, the Federal Unemployment Insurance Tax Act and its related state act, the California Unemployment Insurance Act, fix the status

of such employment for the purposes of administration by each government agency in the administration of the particular portion of the entire National Social Security System vested in it.

A determination of this question by the United States Supreme Court is not only vital in the interest of this petitioner as an "employer" taxpayer, it is important to the several hundred employees in Los Angeles Motor Coach service, not only as "employee" taxpayers but as a final determination of their rights to benefits contemplated by the Social Security System. A determination of this question is important to the several administrative agencies in order that each will have a final judicial determination by virtue of which each must perform their administrative functions consistent with the other.

The evidence in this case shows that Los Angeles Motor Coach Lines is not incorporated but is a name given to those motor coach operations owned and conducted by petitioner and Los Angeles Railway Corporation pursuant to agreement [R. 17-21] and certificates issued by the Railroad Commission of the State of California. [R. 54-55.] Its operations are entirely devoted to the transportation of passengers by motor vehicle in intrastate commerce. "Employment" by incorporated companies engaged in similar operations has been considered in several cases before the Federal courts. In case of *Interstate Transit Lines v. United States,* 56 Fed. Supp. 332, the District Court, District of Nebraska, Omaha Division, held that a railroad owned and controlled bus company was not an "employer" under the special Social Security System for the railroad industry. Railroad owned water carriers have likewise been held not to be "employers" under

the Social Security System for the railroad industry. *Magruder, Collector of Internal Revenue v. Baltimore Steam Packet Co.*, Circuit Court of Appeals, Fourth Circuit, *supra; Allen, Collector of Internal Revenue, District of Georgia, v. Ocean S.S. Co. of Savannah,* 123 F. (2d) 469.

In the case of *Los Angeles Ry. Corp. et al. v. Department of Employment, et al.*, 166 P. (2d) 602, District Court of Appeal, Second Appellate District, Division Three, California, in an action involving the status of employment in Los Angeles Motor Coach service under the California Unemployment Insurance Act held:

> "The trial court in the instant case correctly held that the Pacific Electric Railway Company is not an 'employer' of the individuals who work for Los Angeles Motor Coach Lines, within the definition of the term in the Railroad Unemployment Insurance Act."

A rehearing has been granted in this case and a further decision on rehearing has not yet been rendered. In its decision the California District Court of Appeal held that those in Los Angeles Motor Coach service were its employees and following the reasoning of the Federal courts in the three cases above cited sustained the payment of unemployment insurance taxes under the California Unemployment Insurance Act upon the total compensation paid to such persons. This opinion is consistent with the opinion of the District Court in the instant case. It is consistent with the ruling of the Federal Social Security Board, Office of Appeals Counsel, in awarding widow's current and children's insurance benefit based upon the total compensation of an employee in Los Angeles Motor

Coach Lines service. [R. 112-121.] It is, however, inconsistent with the rulings of the Railroad Retirement Board and the General Counsel of the Railroad Retirement Board [R. 139-146] and of the Commissioner of Internal Revenue in rejecting the claims involved in this proceeding. [R. 27-29.] It is likewise directly opposed to the decision of the Circuit Court of Appeals, the review of which is sought in this petition. The foregoing cases have not been referred to for the purpose of supporting the merits of petitioner's contention in this case but for the purpose of demonstrating to this court the confusion which exists within the minds of the several administrative agencies concerned as well as the courts themselves, all of whom have considered and passed upon the identical situation.

The question presented in this proceeding is important in the administration of the revenue laws and those related laws embraced within the social security system and should be reviewed and determined by this Court.

United States v. Kales, 314 U. S. 186, 86 L. Ed. 132;

District of Columbia v. Murphy, 314 U. S. 441, 86 L. Ed. 329;

Bondholders Committee v. Com. of Int. Rev., 315 U. S. 189, 86 L. Ed. 784;

Helvering v. Southwest Consolidated Corp., 315 U. S. 194, 86 L. Ed. 789;

Helvering v. Cement Investors, Inc., 316 U. S. 527, 86 L. Ed. 1649;

Helvering v. Griffiths, 318 U. S. 371, 87 L. Ed. 843;

Interstate Transit Lines v. Comr. of Int. Rev., 319 U. S. 590, 87 L. Ed. 1607;

Commissioner of Int. Rev. v. Gooch Mill. & E. Co., 320 U. S. 418, 88 L. Ed. 139;

Dobson v. Com. of Int. Rev., 320 U. S. 489, 88 L. Ed. 248.

It is respectfully submitted that the Petition for Writ of Certiorari should be granted.

C. W. CORNELL,
Attorney for Petitioner.

E. L. H. BISSINGER,
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Of Counsel.

APPENDIX.

Internal Revenue Code:

CHAPTER 9—EMPLOYMENT TAXES

SUBCHAPTER A—EMPLOYMENT BY OTHERS THAN CARRIERS

Part I—Tax on Employees

SEC. 1400. [As amended by Sec. 601 of the Social Security Act Amendments of 1939, c. 666, 53 Stat. 1360.] RATE OF TAX.

In addition to other taxes, there shall be levied, collected, and paid upon the income of every individual a tax equal to the following percentages of the wages (as defined in section 1426 (a)) received by him after December 31, 1936, with respect to employment (as defined in section 1426 (b)) after such date:

(1) With respect to wages received during the calendar years 1939, 1940, 1941, and 1942, the rate shall be 1 per centum.

* * * * * * * * * *

(26 U. S. C., 1940 ed., Sec. 1400.)

SEC. 1401. DEDUCTION OF TAX FROM WAGES.

(a) *Requirement.*—The tax imposed by section 1400 shall be collected by the employer of the taxpayer, by deducting the amount of the tax from the wages as and when paid.

* * * * * * * * * *

(26 U. S. C., 1940 ed., Sec. 1401.)

Part II—Tax on Employers

SEC. 1410. [As amended by Sec. 604 of the Social Security Act Amendments of 1939, *supra.*] RATE OF TAX.

In addition to other taxes, every employer shall pay an excise tax, with respect to having individuals in his employ, equal to the following percentages of the wages (as defined in section 1426 (a)) paid by him after December 31, 1936, with respect to employment (as defined in section 1426 (b)) after such date:

(1) With respect to wages paid during the calendar years 1939, 1940, 1941, and 1942, the rate shall be 1 per centum.

* * * * * * * * * *

(26 U. S. C., 1940 ed., Sec. 1410.)

Part III—General Provisions

SEC. 1426. [As amended by Sec. 606 of the Social Security Act Amendments of 1939, *supra.*] DEFINITIONS.

When used in this subchapter—

(a) *Wages.*—The term "wages" means all remuneration for employment, including the cash value of all remuneration paid in any medium other than cash; except that such term shall not include—

(1) That part of the remuneration which, after remuneration equal to $3,000 has been paid to an individual by an employer with respect to employment during any calendar year, is paid to such individual by such employer with respect to employment during such calendar year;

* * * * * * * * * *

(b) *Employment.*—The term "employment" means any service performed prior to January 1, 1940, which was employment as defined in this section prior to such date, and any service, of whatever nature, performed after December 31, 1939, by an employee for the person employing him, * * * except—

* * * * * * * * * *

(9) Service performed by an individual as an employee or employee representative as defined in section 1532;

* * * * * * * * * *

(d) *Employee.*—The term "employee" includes an officer of a corporation.

* * * * * * * * * *

(f) *Person.*—The term "person" means an individual, a trust or estate, a partnership, or a corporation.

* * * * * * * * * *

(26 U. S. C., 1940 ed., Sec. 1426.)

SEC. 1432. [As added by Sec. 607 of the Social Security Act Amendments of 1939, *supra.*]

This subchapter may be cited as the "Federal Insurance Contributions Act."

(26 U. S. C., 1940 ed., Sec. 1432.)

SUBCHAPTER B—EMPLOYMENT BY CARRIERS

Part I—Tax on Employees

SEC. 1500. RATE OF TAX.

In addition to other taxes, there shall be levied, collected, and paid upon the income of every employee a tax equal to the following percentages of so much of the compensation of such employee as is not in excess of $300 for any calendar month, earned by him after the effective date of this subchapter—

1. With respect to compensation earned during the calendar year 1939, the rate shall be 2¾ per centum;

2. With respect to compensation earned during the calendar years 1940, 1941, and 1942, the rate shall be 3 per centum;

* * * * * * * * * *

(26 U. S. C., 1940 ed., Sec. 1500.)

SEC. 1501. DEDUCTION OF TAX FROM COMPENSATION.

(a) *Requirement.*—The tax imposed by section 1500 shall be collected by the employer of the taxpayer by deducting the amount of the tax from the compensation of the employee as and when paid. If an employee is paid compensation by more than one employer with respect to any calendar month, then, under regulations made under this subchapter, the Commissioner may prescribe the proportion of the tax to be deducted by each employer from the compensation paid by him to the employee with respect to such month.

* * * * * * * * * *

(26 U. S. C., 1940 ed., Sec. 1501.)

Part III—Tax on Employers

SEC. 1520. RATE OF TAX.

In addition to other taxes, every employer shall pay an excise tax, with respect to having individuals in his employ, equal to the following percentages of so much of the compensation as is not in excess of $300 for any calendar month paid by him to any employee for services rendered to him after December 31, 1936: *Provided, however,* That if an employee is paid compensation by more than one employer with respect to any such calendar month, the tax imposed by this section shall apply to not more than $300 of the aggregate compensation paid to said employee by all said employers with respect to such calendar month, and each such employer shall be liable for that proportion of the tax with respect to such compensation which his payment to the employee with respect to such calendar month bears to the aggregate compensation paid to such employee by all employers with respect to such calendar month:

1. With respect to compensation paid to employees for services rendered during the calendar year 1939, the rate shall be 2¾ per centum;

2. With respect to compensation paid to employees for services rendered during the calendar years 1940, 1941, and 1942, the rate shall be 3 per centum;

* * * * * * * * * *

(26 U. S. C., 1940 ed., Sec. 1520.)

Part IV—General Provisions

* * * * * * * * * *

SEC. 1531. ERRONEOUS PAYMENTS.

Any tax paid under this subchapter by a taxpayer with respect to any period with respect to which he is not liable to tax under this subchapter shall be credited against the tax, if any, imposed by subchapter A upon such taxpayer, and the balance, if any, shall be refunded.

(26 U. S. C., 1940 ed., Sec. 1531.)

SEC. 1532. DEFINITIONS.

(a) *Employer.*—The term "employer" means any carrier (as defined in subsection (h) of this section), and any company which is directly or indirectly owned or controlled by one or more such carriers or under common control therewith, and which operates any equipment or facility or performs any service (except trucking service, casual service, and the casual operation of equipment or facilities) in connection with the transportation of passengers or property by railroad, or the receipt, delivery, elevation, transfer in transit, refrigeration or icing, storage, or handling of property transported by railroad, and any receiver, trustee, or other individual or body, judicial or otherwise, when in the possession of the property or operating all or any part of the business of any such employer: *Provided, however,* That the term "employer" shall not include any street interurban, or suburban electric railway, unless such railway is operating as a part of a general steam-railroad system of transportation, * * *

(b) *Employee.*—The term "employee" means any person in the service of one or more employers for compensation: *Provided* * * *

The term "employee" includes an officer or an employer.

* * * * * * * * * *

(d) *Service.*—An individual is in the service of an employer whether his service is rendered within or without the United States if he is subject to the continuing authority of the employer to supervise and direct the manner of rendition of his service, which service he renders for compensation: * * *

(e) *Compensation.*—The term "compensation" means any form of money remuneration earned by an individual for services rendered as an employee to one or more employers, or as an employee representative, including * * *

* * * * * * * * * *

(g) *Company.*—The term "company" includes corporations, associations, and joint-stock companies.

(h) *Carrier.*—The term "carrier" means an express company, sleeping-car company, or carrier by railroad, subject to part I of the Interstate Commerce Act.

(i) *Person.*—The term "person" means an individual, a partnership, an association, a joint-stock company, or a corporation.

(26 U. S. C., 1940 ed., Sec. 1532)

SUBCHAPTER C—TAX ON EMPLOYERS OF EIGHT OR MORE

SEC. 1600. [As amended by Sec. 608 of the Social Security Act Amendments of 1939, *supra.*] RATE OF TAX

Every employer (as defined in section 1607 (a)) shall pay for the calender year 1939 and for each calendar year thereafter an excise tax, with respect to having individuals in his employ, equal to 3 per centum of the total wages (as defined in section 1607 (b)) paid by him during the calendar year with respect to employment (as defined in section 1607 (c)) after December 31, 1938.

(26 U. S. C., 1940 ed., Sec. 1600.)

SEC. 1601. [As amended by Sec. 609 of the Social Security Act Amendments of 1939, *supra.*] CREDITS AGAINST TAX.

(a) *Contributions to State Unemployment Funds.*

(1) The taxpayer may, to the extent provided in this subsection and subsection (c), credit against the tax imposed by section 1600 the amount of contributions paid by him into an unemployment fund maintained during the taxable year under the unemployment compensation law of a State which is certified for the taxable year as provided in section 1603.

* * * * * * * * * * *

(26 U. S. C., 1940 ed., Sec. 1601.)

SEC. 1607. [As amended by Sec. 614 of the Social Security Act Amendments of 1939, *supra.*] DEFINITIONS.

When used in this subchapter—

(a) *Employer.*—The term "employer" does not include any person unless on each of some twenty days during the

taxable year, each day being in a different calendar week, the total number of individuals who were employed by him in employment for some portion of the day (whether or not at the same moment of time) was eight or more.

(b) *Wages.*—The term "wages" means all remuneration for employment, including the cash value of all remuneration paid in any medium other than cash; except that such term shall not include—

(1) That part of the remuneration which, after remuneration equal to $3,000 has been paid to an individual by an employer with respect to employment during any calender year, is paid to such individual by such employer with respect to employment during such calendar year;

* * * * * * * * * *

(c) *Employment.*—The term "employment" means any service performed prior to January 1, 1940, which was employment as defined in this section prior to such date, and any service, of whatever nature, performed after December 31, 1939, within the United States by an employee for the person employing him, irrespective of the citizenship or residence of either, except—

* * * * * * * * * *

(9) Service performed by an individual as an employee or employee representative as defined in section 1 of the Railroad Unemployment Insurance Act;

* * * * * * * * * *

(i) *Employee.*—The term "employee" includes an officer of a corporation.

* * * * * * * * * *

(k) *Person.*—The term "person" means an individual, a trust or estate, a partnership, or a corporation.

(26 U. S. C., 1940 ed., Sec. 1607.)

SEC. 1611. [As added by Sec. 615 of the Social Security Act Amendments of 1939, *supra.*]

This subchapter may be cited as the "Federal Unemployment Tax Act."

(26 U. S. C., 1940 ed., Sec. 1611.)

The above-quoted provisions of subchapter B of Chapter 9 of the International Revenue Code, relating to employment by carriers, are derived from and superseded the Carriers Taxing Act of 1937, c. 405, 50 Stat. 435. The only substantive difference between the original and present provisions is that Sections 2 (a) and 3 (a) of the original act specified the rate of tax levied for the years 1937 and 1938, whereas the Code specifies the rate only for 1939 and subsequent years: Thus: Carriers Taxing Act of 1937, c. 405, 50 Stat. 435:

SEC. 2. (a) In addition to other taxes, there shall be levied, collected, and paid upon the income of every employee a tax equal to the following percentages of so much of the compensation of such employee as is not in excess of $300 for any calendar month, earned by him after December 31, 1936—

1. With respect to compensation earned during the calendar years 1937, 1938, and 1939, the rate shall be 2¼ per centum;

* * * * * * * * *

(45 U. S. C., 1940 ed., Sec. 262.)

SEC. 3. (a) In addition to other taxes, every employer shall pay an excise tax, with respect to having individuals in his employ, equal to the following percentages of so much of the compensation as is not in excess of $300 for any calendar month paid by him to any employee for services rendered to him after December 31, 1936: *Provided, however,* * * *

1. With respect to compensation paid to employees for services rendered during the calendar years 1937, 1938, and 1939, the rate shall be 2¾ per centum;

* * * * * * * * * * *

(45 U. S. C., 1940 ed., Sec 263.)

The above-quoted provisions of subchapters A and C of Chapter 9 of the Internal Revenue Code, now designated as the "Federal Insurance Contributions Act" and the "Federal Unemployment Tax Act," respectively, are derived from and superseded Sections 801, 802, 804, and 811 of Title VIII and Sections 901, 902 and 907 of Title IX of the Social Security Act, c. 531, 49 Stat. 636. Treasury Regulations 100, promulgated under the Carriers Taxing Act of 1937:

ART. 3. *Who are employees.*—(*a*) *General.*—Within the meaning of the Act, any person is an *employee* if he is in the service of one or more employers (as defined in section 1(a)) for compensation. An individual is in the service of an employer if he is subject to the continuing authority of the employer to supervise and direct the manner in which he renders services for compensation. It is not necessary that the employer actually direct or control the manner in which the services are performed; it is sufficient if the employer has the right to do so. The right

of an employer to discharge an individual is also an important factor indicating that the individual is an employee. Other factors indicating that an individual is an employee are the furnishing of tools and the furnishing of a place to work by the employer to the individual who performs the services. * * *

* * * * * * * * *

Whether or not an individual is an employee will be determined upon an examination of the particular facts of the case.

If an individual is an employee, it is of no consequence that he is designated as a partner, coadventurer, agent, independent contractor, or otherwise, or that he performs services on a part-time basis. The age of the individual, or the measurement, method, or designation of the remuneration, is immaterial, if he is in fact an employee.

The Act makes no distinction between classes or grades of employees. Thus, superintendents, managers, and other superior employees are employees within the meaning of the Act. An officer of an employer is an employee. A director is not an employee unless he performs services other than those required by attendance at and participation in meetings of the board of directors.

* * * * * * * * * *

Treasury Regulations 106, promulgated under the Federal Insurance Contributions Act:

SEC. 402.204. *Who are employees.*—Every individual is an employee if the relationship between him and the person for whom he performs services is the legal relationship of employer and employee.

Generally such relationship exists when the person for whom services are performed has the right to control and direct the individual who performs the services, not only as to the result to be accomplished by the work but also as to the details and means by which that result is accomplished. That is, an employee is subject to the will and control of the employer not only as to *what* shall be done but *how* it shall be done. In this connection, it is not necessary that the employer actually direct or control the manner in which the services are performed; it is sufficient if he has the right to do so. The right to discharge is also an important factor indicating that the person possessing that right is an employer. Other factors characteristic of an employer, but not necessarily present in every case, are the furnishing of tools and the furnishing of a place to work, to the individual who performs the services. * * *

* * * * * * * * *

Whether the relationship of employer and employee exists will in doubtful cases be determined upon an examination of the particular facts of each case.

If the relationship of employer and employee exists, the designation or description of the relationship by the parties as anything other than that of employer and employee is immaterial. Thus, if such relationship exists, it is of no consequence that the employee is designated as a partner, coadventurer, agent, or independent contractor.

* * * * * * * * *

No distinction is made between classes or grades of employees. Thus, superintendents, managers, and other superior employees are employees. An officer of a corporation is an employee of the corporation but a director as such is not. A director may be an employee of the corporation, however, if he performs services for the corporation other than those required by attendance at and participation in meetings of the board of directors.

* * * * * * * * * *

Railroad Unemployment Insurance Act:

(45 U. S. C., Section 351.)

"SEC. 351. Definitions

For the purposes of this chapter, except when used in amending the provisions of other Acts—

(a) The term 'employer' means any carrier (as defined in subsection (b) of this section), and any company which is directly or indirectly owned or controlled by one or more such carriers or under common control therewith, and which operates any equipment or facility or performs any service (except trucking service, casual service, and the casual operation of equipment or facilities) in connection with the transportation of passengers or property by railroad, or the receipt, delivery, elevation, transfer in transit, refrigeration or icing, storage, or handling of property transported by railroad, and any receiver, trustee, or other individual or body, judicial or otherwise, when in the possession of the property or operating all or any part of the business of any such employer: Provided, however, That the term 'employer' shall not include any street, inter-

urban, or suburban electric railway, unless such railway is operating as a part of a general steam-railroad system of transportation, * * *."

* * * * * * * * *

"(b) The term 'carrier' means an express company, sleeping-car company, or carrier by railroad, subject to chapter 1 of Title 49.

(c) The term 'company' includes corporations, associations, and joint-stock companies.

(d) The term 'employee' (except when used in phrases establishing a different meaning) means any individual who is or has been (i) in the service of one or more employers for compensation, * * *."

* * * * * * * * *

"(e) An individual is in the service of an employer whether his service is rendered within or without the United States if he is subject to the continuing authority of the employer to supervise and direct the manner of rendition of his service, which service he renders for compensation:"

* * * * * * * * *

"(g) The term 'employment' means service performed as an employee."

* * * * * * * * * *

"(i) The term 'compensation' means any form of money remuneration, including pay for time lost but excluding tips, payable for services rendered as an employee to one

or more employers, or as an employee representative: Provided, however, That in computing the compensation payable to any employee with respect to any calendar month, no part of any compensation in excess of $300 shall be recognized."

* * * * * * * * * *

(45 U. S. C., Section 358.)

"SEC. 358. Contributions—Employers' contributions.

(a) Every employer shall pay a contribution, with respect to having employees in his service, equal to 3 per centum of so much of the compensation as is not in excess of $300 for any calendar month payable by him to any employee with respect to employment after June 30, 1939: Provided, however, That if compensation is payable to an employee by more than one employer with respect to any such calendar month, the contributions required by this subsection shall apply to not more than $300 of the aggregate compensation payable to said employee by all said employers with respect to such calendar month, and each such employer shall be liable for that proportion of the contribution with respect to such compensation which the amount payable by him to the employee with respect to such calendar month bears to the aggregate compensation payable to such employee by all employers with respect to such calendar month."

* * * * * * * * * *

(45 U. S. C., Section 363.)

"SEC. 363. Exclusiveness of provisions; transfers from State unemployment compensation accounts to railroad unemployment insurance account—Effect on State unemployment compensation laws.

(a) By enactment of this chapter the Congress makes exclusive provision for the payment of unemployment benefits for unemployment occurring after June 30, 1939, based upon employment (as defined in this chapter). No employee shall have or assert any right to unemployment benefits under an unemployment compensation law of any State with respect to unemployment occurring after June 30, 1939, based upon employment (as defined in this chapter). The Congress finds and declares that by virtue of the enactment of this chapter, the application of State unemployment compensation laws after June 30, 1939, to such employment, except pursuant to section 362(g) of this title, would constitute an undue burden upon, and an undue interference with the effective regulation of, interstate commerce. In furtherance of such determination, after June 30, 1939, the term 'person' as used in section 1106 of Title 42 shall not be construed to include any employer (as defined in this chapter) or any person in its employ:"

* * * * * * * * *

(45 U. S. C., Section 367.)

"SEC. 367. Short title

This chapter may be cited as the 'Railroad Unemployment Insurance Act.' June 25, 1938, c. 680, §17, 52 Stat. 1113."

California Unemployment Insurance Act:

CALIFORNIA STATUTES OF 1935, CHAPTER 352, as amended.

Sec. 2. This act is enacted as a part of a National plan of unemployment reserves and social security, and for the purpose of assisting in the stabilization of employment conditions. The imposition of the tax herein imposed upon California industry alone, without a corresponding tax being imposed upon all industry in the United States, would, by the corresponding penalty upon California industry, defeat the very purposes of this act set forth in Section 1. Therefore this act shall take effect only if and when there is enacted legislation by the United States Government providing for a tax upon the payment of wages by employers in this State, against which all or any part of the contributions required by this act may be credited.

Whenever such legislation enacted by the United States Government is repealed, amended, interpreted, affected or otherwise changed in such manner that no portion of the contributions required by this act may be thus credited, then upon the date of such change, the provisions of this act requiring contributions and providing for payment of benefits shall cease to be operative and any assets in the Unemployment Fund or Unemployment Administration Fund shall in the discretion of the State Treasurer be held in the then existing depositaries or otherwise in the State Treasury. In the case of the Unemployment Administration Fund, such moneys may thereafter be dealt with by the State Treasurer pursuant to the conditions of the grant thereof to the State by the United States Government or agency thereof.

(Amended by Stats. 1943, Ch. 1107.)

* * * * * * * * *

Sec. 7.5. The term employment does not include service performed after June 30, 1939, with respect to which unemployment compensation is payable under the Railroad Unemployment Insurance Act, and service with respect to which unemployment benefits are payable under an unemployment compensation system for maritime employees established by an act of Congress.

(Added by Stats. 1939, ch. 169; Effective May 19, 1939.)

FILE COPY

No. 1077

In the Supreme Court of the United States

OCTOBER TERM, 1946

PACIFIC ELECTRIC RAILWAY COMPANY, A CORPORATION, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

INDEX

CITATIONS

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OPINIONS BELOW

The opinion of the district court (R. 173–196) is reported at 64 F. Supp. 796.[1] The opinion of the circuit court of appeals (R. 206–216) is reported at 157 F. 2d 902.

JURISDICTION

The judgment of the circuit court of appeals was entered on November 4, 1946. (R. 216–217.)

[1] The District Court's findings of fact and conclusions of law (R. 155–165) are not included in the opinion.

Petition for rehearing was denied December 5, 1946. (R. 217.) The petition for a writ of certiorari was filed February 28, 1947. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether petitioner properly paid carriers tax during the taxable years under the Carriers Taxing Act of 1937 and Subchapter B, Chapter 9 of the Internal Revenue Code on one-half the compensation of employees engaged in the bus line operations designated as "Coach Lines." The answer depends upon whether those employees were the joint employees of petitioner and Los Angeles Railway, which jointly conducted the operations, or of Coach Lines as a separate employing entity.

STATUTES AND REGULATIONS INVOLVED

The pertinent statutes and Regulations are set forth in the Appendix, *infra,* pp. 19–32.

STATEMENT

Petitioner, the Pacific Electric Railway Company, is a California corporation with its principal place of business in Los Angeles. (R. 53.) It now is, and at all times since January 1, 1937, has been, (1) a common carrier engaged in the transportation of passengers and property for hire by rail and motor coach in Los Angeles

and adjacent territory; (2) a railroad corporation engaged in interstate commerce; and (3) an "employer" as defined in the Railroad Retirement Act of 1937, the Carriers Taxing Act of 1937, and Chapter 9, Subchapter B, of the Internal Revenue Code, formerly the Carriers Taxing Act of 1937, and subject to the provisions of these statutes. (R. 54, 55). The Los Angeles Railway Corporation, a California corporation hereinafter called "Los Angeles Railway," is a street railway corporation and as such has not been and is not now an employer subject to the Railroad Retirement Act, Carriers Taxing Act of 1937, or Chapter 9, Subchapter B, of the Internal Revenue Code; instead, it is subject to the provisions of Chapter 9, Subchapter A, of the Internal Revenue Code, which originated as a part of the Social Security Act and is now known as the "Federal Insurance Contributions Act." (R. 55.)

At all times since January 1, 1937, petitioner and Los Angeles Railway have jointly operated certain motor coach routes in Los Angeles and adjacent territory for the transportation of passengers by motor coach, such routes being operated for convenience. (R. 54.) The operations are presently being carried on under the name "Los Angeles Motor Coach Lines" and were previously carried on under the names "Los Angeles Motor Coach Company" and "Los Angeles Motor Bus Company," respectively. (R. 53–54.) None of

these is or ever has been a corporation; the names adopted have at all times been used simply for the purpose of identifying the joint motor coach operations of petitioner and Los Angeles Railway conducted pursuant to certificates of public convenience and necessity issued by the Railroad Commission of the State of California authorizing operation under an agreement dated August 15, 1923, between petitioner and Los Angeles Railway. (R. 54–55.) The name "Coach Lines" will be used herein to designate these operations.

During the period January 1, 1937, to December 31, 1940, inclusive, petitioner paid employees and employers tax under the Carriers Taxing Act of 1937 and subchapter B, Chapter 9, of the Internal Revenue Code, on one-half of the total compensation paid to the employees engaged in the Coach Lines service. That portion of their compensation was charged to and borne by petitioner. Los Angeles Railway paid social security tax on the remaining one-half. (R. 63.) The total carriers tax paid by taxpayer during the period January 1, 1937, to December 31, 1940, inclusive, on one-half of the compensation of the employees engaged in the Coach Lines service was $66,124.65, of which $33,062.45, or approximately one-half, was employers tax and the other one-half, $33,062.20 employees tax. (R. 56–62.)

On or about April 22, 1941 (R. 24, 32, 37, 42), petitioner filed claims for refund of the carriers taxes paid in respect of the employees engaged

in the Coach Lines service during the period January 1, 1937, to December 31, 1940, inclusive. (R. 22–26, 30–44.) In these claims for refund, petitioner admitted that the taxes had been paid in accordance with the opinion of its counsel and that the Coach Lines was not a corporation and was merely a name given to the motor bus service jointly operated by petitioner and Los Angeles Railway. (R. 25, 33, 38, 43.) The claims were filed as a protective measure, because of a ruling of the California Employment Commission that Coach Lines is an employing unit within the meaning of the California Unemployment Insurance Act (R. 25–26, 33–34, 38–39, 43–44). The Commissioner of Internal Revenue disallowed the claims for refund on the ground that the individuals engaged in the Coach Lines operations were joint employees of petitioner and Los Angeles Railway (rather than employees of the Coach Lines as a separate entity) and, thus, that carriers tax is payable by petitioner on one-half of the compensation of such employees and social security payable by Los Angeles Railway on the other one-half. (R. 27–29.) Petitioner subsequently filed suit in the United States District Court for the Southern District of California for a refund of the carriers taxes it paid on one-half of the wages of the employees engaged in the Coach Lines service. (R. 2–17.)

The district court held, on the basis of facts which were all stipulated and which will be summa-

rized later, that Coach Lines is an "association" under the decision in *Morrissey* v. *Commissioner*, 296 U. S. 344, and therefore a "company" within the meaning of Section 1532 of the Internal Revenue Code, which is contained in subchapter B of Chapter 9 and corresponds to Section 1 of the Carriers Taxing Act of 1937, and that, since the "company" was not a carrier, its employees were covered by the social security statutes and not one-half by the carriers taxing statute. (R. 176–196.) On appeal, the court below reversed the decision of the district court, holding that the stipulated facts showed that Coach Lines was not an "association" or any other type of employing entity, that the employees engaged in the Coach Lines operations were joint employees of petitioner and Los Angeles Railway, and that, therefore, to the extent of one-half of their compensation, these employees were employees of petitioner within the meaning of the carriers taxing statute, now subchapter B, Chapter 9 of the Internal Revenue Code, and that the taxes involved had been properly collected. (R. 214–216.)

The facts bearing on the issue as to the employer of the employees engaged in the Coach Lines operations were all stipulated (R. 53–73) and, in addition to those already stated, are as follows:

The joint operations of the Coach Lines by petitioner and Los Angeles Railway have at all times been conducted in accordance with an agree-

ment dated August 15, 1923, which is set out in full at pages 17–21 of the Record. (R. 55.) This agreement specifically provided that the operations should constitute only an agency or joint department and that it should not constitute a partnership. (R. 17–18.)

The operations, which are in intrastate commerce only, are conducted by petitioner's president and the president of Los Angeles Railway, as the joint agents (called directors) of their companies, through a manager, an assistant manager, a superintendent of equipment and other subordinate officers and employees. (R. 17, 18–19, 64.) The agreement provided (R. 19) that these directors "shall jointly manage in all respects for their principals herein [petitioner and Los Angeles Railway Corporation], the said department, and have general control thereover." Petitioner and Los Angeles Railway, through their joint agents, jointly regulate the conditions of employment of employees and dismiss employees in the Coach Lines service. (R. 56.) The Coach Lines, as such, has no officers and the joint employees charged with the supervision and management of the Coach Lines operations are directly responsible to the general manager who in turn reports directly to the managing directors by whom he is appointed, the presidents of the two companies. The general manager, together with his supervisory staff, has general charge of the

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Coach Lines operations, but all matters of a controversial nature, or which in any way might conflict with the exclusive interests of petitioner or Los Angeles Railway, and all matters involving important questions of policy are determined by agreement between petitioner's president and the president of Los Angeles Railway. (R. 64–65.)

The accounting and auditing work in connection with the Coach Lines operations is performed by the accounting department of Los Angeles Railway. The law, claim, purchasing, and traffic work is performed by petitioner through its officers and departments regularly performing such work exclusively for petitioner. Employees engaged in the Coach Lines service are accorded medical treatment and hospitalization by the hospital department maintained by petitioner under the same terms, rules and regulations as govern the rendition of medical and hospital service to the sole employees of petitioner. (R. 65.) Tariffs naming local one-way, round-trip and commutation fares between points on lines operated under the Coach Lines name and joint fares between points on the lines of petitioner and Los Angeles Railway are issued by H. O. Marler, traffic manager of petitioner, and duly posted, published and on file with the Railroad Commission of the State of California. (R. 66.)

The joint employees engaged in the Coach Lines service, including the supervisory forces, are

employed to work exclusively in this service and devote their entire time to it and are not interchanged with either petitioner or Los Angeles Railway. (R. 65.)

Each company owns and furnishes approximately one-half of the equipment and facilities devoted to this joint service. Title to these facilities remains in the company furnishing them. (R. 18, 64.) All revenues from the joint operation are deposited in a separate account identified with the operation, and payment of all expenses in connection with the operation, including payrolls, are made from this special account. (R. 65.) The expense incurred in connection with the conduct of the joint operation is borne approximately in equal proportions by each company, and each shares in the revenues and losses in the same ratio. (R. 20, 64.) The agreement provided that neither of the parties should, without the consent of the other, sell or assign its interest in the subject matter. (R. 21.) And it was further provided that the agreement should continue until terminated at any time by either party giving six months' written notice to the other party of its intention to terminate the agreement. (R. 21.)

Petitioner maintains its records in accordance with the Uniform System for Classification of Accounts as prescribed by the Interstate Commerce Commission and includes in its report to

the Interstate Commerce Commission its proportionate share of gross revenues and expenses, credited and charged to it in connection with the operation designated Coach Lines. The Coach Lines items of revenue and expenses are included together with all other items of revenues and expenses under the appropriate item therefor in this classification. (R. 55–56.)

ARGUMENT

As petitioner concedes (Pet. 8), the sole issue involved in this case is whether the persons engaged in the operations of Coach Lines are employees of Coach Lines as an employing entity or are the joint employees of petitioner and Los Angeles Railway.[2] As we shall show, the stipulated

[2] Had petitioner owned or controlled Coach Lines, instead of having a 50% control, the employees of Coach Lines would apparently have been covered exclusively by the Carriers Taxing Act even if Coach Lines were an employing entity. An "employer" for the purposes of the Act (see Sec. 1532, Internal Revenue Code (Appendix, *infra*, p. 24)) includes a company which is (1) owned or controlled by one or more carriers and (2) performs any service in connection with the transportation of passengers by railroad. The Coach Lines apparently fulfill the second requirement, for it is stipulated that (R. 66):

> * * * there is in effect a system for transferring of passengers from and to motor coaches operated in Los Angeles Motor Coach Lines service to and from rail cars and motor coaches operated on certain lines of both Pacific Electric Railway Company and Los Angeles Railway Corporation. That tariffs naming local one-way, round-trip and commutation fares be-

facts clearly require the conclusion that, as the court below held (R. 216), these employees are joint employees of petitioner and Los Angeles Railway. Indeed, petitioner paid the tax here involved on the basis of such a conclusion and instituted this proceeding only as a protective measure, because of a ruling of the California Employment Commissioner that Coach Lines is an employing entity. (See R. 25–26, 33–34, 38–39, 43–44.) That ruling was affirmed by a California inferior court on February 1, 1946, in *Los Angeles Ry. Corp.* v. *Department of Employ., Etc.*, 166 P. 2d 602. However, the decision in that case relied on the decision of the district court in the present case and, since the rehearing granted in the state case on March 1, 1946 (*ibid.*) is still pending (Pet. 12), the state court is no doubt awaiting the outcome of the present proceeding. The decision below, accompanied by a denial of certiorari, should therefore be sufficient to dissipate the present conflict with this state decision, as well as any conflict in administrative rulings as to

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tween points on lines operated under the name Los Angeles Motor Coach Lines and joint fares between points on said lines and points on lines of Los Angeles Railway Corporation and Pacific Electric Railway Company are issued by H. O. Marler, Traffic Manager of Pacific Electric Railway Company, and duly posted, published and on file with the Railroad Commissioner of the State of California.

Thus, see *Railroad Retirement Board* v. *Duquesne Co.*, 326 U. S. 446. But on this point compare cases cited *infra*, p. 17.

the status of these employees.[3] Since the issue involved turns on the peculiar facts of this case, no federal question is presented requiring further review by this Court.

As the court below held (R. 214), Coach Lines is not an "association." An association is an organization of persons without a charter but having the general form and mode of procedure of a corporation. Its essential characteristics are (1) an entity which holds title to the property involved in the business; (2) a centralized management analogous to that of corporate activities; (3) a continuity of the business enterprise which is unaffected by acts of the owners of the beneficial interests or by transfer of those interests; and (4) a limitation of the personal liability of the participants in the business undertaking. *Morrissey* v. *Commissioner,* 296 U. S. 344; *Helver-*

[3] A ruling of the Social Security Board is in conflict with the decision below and administrative rulings of other agencies, for, on a claim for benefits under the social security statutes by the widow of one of the former bus operators on Coach Lines, the Social Security Board ruled that Coach Lines is an employer within the meaning of the social security statutes. (R. 113–121.) On the other hand, the Railroad Retirement Board ruled in 1940 that the employees engaged in the Coach Lines operations are joint employees of petitioner and Los Angeles Railway, that they are therefore employees of petitioner to the extent of the one-half of their compensation paid by petitioner, and that that one-half of their compensation is subject to carriers tax. (R. 139–146.) A ruling of the Interstate Commerce Commission is in accord with this ruling of the Railroad Retirement Board. (R. 147–154.)

ing v. *Combs,* 296 U. S. 365; *Helvering* v. *Coleman-Gilbert,* 296 U. S. 369; *Commissioner* v. *Rector & Davidson,* 111 F. 2d 332, 333 (C. C. A. 5), certiorari denied, 311 U. S. 672. None of these characteristics attended the operation of the Coach Lines. No separate entity held title to the property used in the operations; petitioner and Los Angeles Railway each furnished all of the equipment and facilities used and each held title to the equipment and facilities it furnished. There was no separate centralized management of the Coach Lines akin to the management of a corporation; the bus lines were managed by a general manager and subordinates who were directly accountable to the presidents of petitioner and Los Angeles Railway as the directors of the operations and agents of their principals, petitioner and Los Angeles Railway. Thus, petitioner and Los Angeles Railway controlled the Coach Lines operations, instead of a separate governing body elected by stockholders or beneficial owners.

Coach Lines had no continuity of interest unaffected by the acts of its beneficial owners. In the first place, Coach Lines had no beneficial owners; as already stated, petitioner and Los Angeles Railway separately owned all of the equipment and facilities. Thus, unlike a corporation, there were no common assets to be represented by shares of stock or certificates of beneficial ownership. Secondly, the joint enterprise could be terminated by either petitioner or Los

Angeles Railway upon six months' notice. Third, no provision was made for continuance of the operations if either petitioner or Los Angeles Railway, each of which separately owned its part of the property used in the operations, should be dissolved or should cease to exist. And, of course, since there was no common property and hence no beneficial interests in such property, there was no limitation on the liability of the beneficial owners.

The joint operation of Coach Lines did not establish any other organization recognizable as an entity. It is stipulated that Coach Lines is not and has never been a corporation. It obviously is not a joint-stock company. In the agreement for the operation of this bus service, petitioner and Los Angeles Railway stated that Coach Lines was not to be a partnership (R. 18.) It clearly was not one. A partnership requires joint or co-ownership of the property and business (*City of Wheeling* v. *Chester,* 134 F. 2d 759, 762 (C. C. A. 3); *McClennen* v. *Commissioner,* 131 F. 2d 165, 167 (C. C. A. 1); *Stilgenbaur* v. *United States,* 115 F. 2d 283, 285 (C. C. A. 9)), and petitioner and Los Angeles Railway separately owned the property used in the business. Moreover, in a partnership each partner has power to act as agent for his co-partner (*Karrick* v. *Hannaman,* 168 U. S. 328, 334) while in the present case petitioner and Los Angeles Railway acted through

joint agents who were, however, limited to matters respecting the operation of the bus lines. In brief, Coach Lines was simply an agency or joint department of petitioner and Los Angeles Railway, as is shown by the stipulation of facts. Although a joint venture may possibly under some circumstances constitute an employing entity, this agency or joint department had no authority interposed between the employees and either petitioner or Los Angeles Railway.

In order to show that the persons engaged in the Coach Lines operations are "employees" it is necessary to reveal the identity of their employer or employers. These persons are "employees" within the meaning of the statutes applicable to carriers (see Section 1532 of the International Revenue Code) because they are subject to the continuing authority of an employer to supervise and direct the manner of rendition of the services which they render for compensation. Under Article 3, Treasury Regulations 100, promulgated under the Carriers Taxing Act of 1937 (Appendix, *infra*, pp. 29–30), the status of a person as an employee depends upon whether the person is in the service of one or more employers and the features mentioned as indicative of whether a person is in the service of an employer are (1) whether he is subject to the continuing authority of the employer to supervise and direct the manner in which he renders services for compensation, irrespective of whether

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the employer actually does control the manner in which the services are performed; (2) the right of the employer to discharge the person; and (3) the furnishing of tools and of a place to work by the employer to the person who performs the services. Officers, superintendents, managers and other superior employees are employees within the meaning of the applicable statute.

In the present case, petitioner and Los Angeles Railway are designated as the "principals who shall manage and control said business." (R. 18.) As their joint agents, they appointed the presidents of the two companies to conduct the business through a manager, assistant manager, superintendent of equipment, and other subordinate officers and employees. (R. 17–19, 56.) Coach Lines as such has no officers and the joint employees engaged in the supervision and management of the operations are directly responsible to the general manager who in turn reports directly to the managing directors, the presidents of the two companies. (R. 64.) Thus, it is stipulated that petitioner, jointly with Los Angeles Railway, through its joint agents, directors, the manager and subordinate officers, hire employees, regulate the conditions of employment of employees and dismiss employees in the Coach Lines operations. (R. 56.) The general manager, together with his supervisory staff, have general charge of the operations but all matters of a controversial

nature or which in any way might conflict with the exclusive interests of petitioner or Los Angeles Railway, and all matters involving important questions of policy are determined by agreement between the presidents of the two companies. (R. 64.) Petitioner and Los Angeles Railway each does some of the work connected with the joint operation. (R. 65.) Each company owns and furnishes approximately one-half of the equipment and facilities devoted to the joint service and each retains title to the facilities it furnishes. (R. 64.) Thus, under the above-stated test of what constitutes an employee, as well as under any other conceivable test, the persons engaged in the Coach Lines operations are clearly the joint employees of petitioner and Los Angeles Railway. As the parties have stipulated (R. 17–18, 54–55), Coach Lines is merely a name adopted for convenience in identifying the bus operations conducted by petitioner and Los Angeles Railway.

The cases cited by petitioner (*Walling* v. *Baltimore Steam Packet Co.,* 144 F. 2d 130 (C. C. A. 4); *Allen* v. *Ocean S. S. Co. of Savannah,* 123 F. 2d 469 (C. C. A. 5); *Interstate Transit Lines* v. *United States,* 56 F. Supp. 332 (Neb.)) all involved corporations controlled by carriers and are therefore inapposite here.

CONCLUSION

The decision below is correct, and since the case turns upon its particular facts no further

review is warranted. The petition for a writ of certiorari should therefore be denied.

Respectfully submitted.

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MARCH 1947.

APPENDIX

Internal Revenue Code:

CHAPTER 9—EMPLOYMENT TAXES

SUBCHAPTER A—EMPLOYMENT BY OTHERS THAN CARRIERS

Part I—Tax on Employees

SEC. 1400. [As amended by Sec. 601 of the Social Security Act Amendments of 1939, c. 666, 53 Stat. 1360.] RATE OF TAX.

In addition to other taxes, there shall be levied, collected, and paid upon the income of every individual a tax equal to the following percentages of the wages (as defined in section 1426 (a)) received by him after December 31, 1936, with respect to employment (as defined in section 1426 (b)) after such date:

(1) With respect to wages received during the calendar years 1939, 1940, 1941, and 1942, the rate shall be 1 per centum.

* * * * *

(26 U. S. C. 1940 ed., Sec. 1400.)

SEC. 1401. DEDUCTION OF TAX FROM WAGES.

(a) *Requirement.*—The tax imposed by section 1400 shall be collected by the employer of the taxpayer, by deducting the amount of the tax from the wages as and when paid.

* * * * *

(26 U. S. C. 1940 ed., Sec. 1401.)

Part II—Tax on Employers

SEC. 1410. [As amended by Sec. 604 of the Social Security Act Amendments of 1939, *supra.*] RATE OF TAX.

In addition to other taxes, every employer shall pay an excise tax, with respect to having individuals in his employ, equal to the following percentages of the wages (as defined in section 1426 (a)) paid by him after December 31, 1936, with respect to employment (as defined in section 1426 (b)) after such date:

(1) With respect to wages paid during the calendar years 1939, 1940, 1941, and 1942, the rate shall be 1 per centum.

* * * * *

(26 U. S. C. 1940 ed., Sec. 1410.)

Part III—General Provisions

SEC. 1426. [As amended by Sec. 606 of the Social Security Act Amendments of 1939, *supra.*] DEFINITIONS.

When used in this subchapter—

(a) *Wages.*—The term "wages" means all remuneration for employment, including the cash value of all remuneration paid in any medium other than cash; except that such term shall not include—

(1) The part of the remuneration which, after remuneration equal to $3,000 has been paid to an individual by an employer with respect to employment during any calendar year, is paid to such individual by such employer with respect to employment during such calendar year;

* * * * *

(b) *Employment.*—The term "employment" means any service performed prior to January 1, 1940, which was employment as defined in this section prior to such date, and any service, of whatever nature, performed after December 31, 1939, by an employee for the person employing him, * * * except—

* * * * *

(9) Service performed by an individual as an employee or employee representative as defined in section 1532;

* * * * *

(d) *Employee.*—The term "employee" includes an officer of a corporation.

* * * * *

(f) *Person.*—The term "person" means an individual, a trust or estate, a partnership, or a corporation.

* * * * *

(26 U. S. C. 1940 ed., Sec. 1426.)

SEC. 1432. [As added by Sec. 607 of the Social Security Act Amendments of 1939, *supra.*]

This subchapter may be cited as the "Federal Insurance Contributions Act."

(26 U. S. C. 1940 ed., Sec. 1432.)

SUBCHAPTER B—EMPLOYMENT BY CARRIERS

Part I—Tax on Employees

SEC. 1500. RATE OF TAX.

In addition to other taxes, there shall be levied, collected, and paid upon the income of every employee a tax equal to the following percentages of so much of the compensation of such employee

as is not in excess of $300 for any calendar month, earned by him after the effective date of this subchapter—

1. With respect to compensation earned during the calendar year 1939, the rate shall be 2¾ per centum;

2. With respect to compensation earned during the calendar years 1940, 1941, and 1942, the rate shall be 3 per centum;

* * * * *

(26 U. S. C. 1940 ed., Sec. 1500.)

SEC. 1501. DEDUCTION OF TAX FROM COMPENSATION.

(a) *Requirement.*—The tax imposed by section 1500 shall be collected by the employer of the taxpayer by deducting the amount of the tax from the compensation of the employee as and when paid. If an employee is paid compensation by more than one employer with respect to any calendar month, then, under regulations made under this subchapter, the Commissioner may prescribe the proportion of the tax to be deducted by each employer from the compensation paid by him to the employee with respect to such month.

* * * * *

(26 U. S. C. 1940 ed., Sec. 1501.)

Part III—Tax on Employers

SEC. 1520. RATE OF TAX.

In addition to other taxes, every employer shall pay an excise tax, with respect to having individuals in his employ, equal to the following per-

centages of so much of the compensation as is not in excess of $300 for any calendar month paid by him to any employee for services rendered to him after December 31, 1936: *Provided, however,* That if an employee is paid compensation by more than one employer with respect to any such calendar month, the tax imposed by this section shall apply to not more than $300 of the aggregate compensation paid to said employee by all said employers with respect to such calendar month, and each such employer shall be liable for that proportion of the tax with respect to such compensation which his payment to the employee with respect to such calendar month bears to the aggregate compensation paid to such employee by all employers with respect to such calendar month:

1. With respect to compensation paid to employees for services rendered during the calendar year 1939, the rate shall be 2¾ per centum;

2. With respect to compensation paid to employees for services rendered during the calendar years 1940, 1941, and 1942, the rate shall be 3 per centum;

* * * * *

(26 U. S. C. 1940 ed., Sec. 1520.)

Part IV—General Provisions

* * * * *

SEC. 1531. ERRONEOUS PAYMENTS.

Any tax paid under this subchapter by a taxpayer with respect to any period with respect to which he is not liable to tax under this subchapter

shall be credited against the tax, if any, imposed by subchapter A upon such taxpayer, and the balance, if any, shall be refunded.

(26 U. S. C. 1940 ed., Sec. 1531.)

SEC. 1532. DEFINITIONS.

(a) *Employer.*—The term "employer" means any carrier (as defined in subsection (h) of this section), and any company which is directly or indirectly owned or controlled by one or more such carriers or under common control therewith, and which operates any equipment or facility or performs any service (except trucking service, casual service, and the casual operation of equipment or facilities) in connection with the transportation of passengers or property by railroad, or the receipt, delivery, elevation, transfer in transit, refrigeration or icing, storage, or handling of property transported by railroad, and any receiver, trustee, or other individual or body, judicial or otherwise, when in the possession of the property or operating all or any part of the business of any such employer: *Provided, however,* That the term "employer" shall not include any street, interurban, or suburban electric railway, unless such railway is operating as a part of a general steam-railroad system of transportation, * * *

(b) *Employee.*—The term "employee" means any person in the service of one or more employers for compensation: *Provided* * * *

The term "employee" includes an officer of an employer.

* * * * *

(d) *Service.*—An individual is in the service of an employer whether his service is rendered

within or without the United States if he is subject to the continuing authority of the employer to supervise and direct the manner of rendition of his service, which service he renders for compensation: * * *

(e) *Compensation.*—The term "compensation" means any form of money remuneration earned by an individual for services rendered as an employee to one or more employers, or as an employee representative, including * * *

* * * * *

(g) *Company.*—The term "company" includes corporations, associations, and joint-stock companies.

(h) *Carrier.*—The term "carrier" means an express company, sleeping-car company, or carrier by railroad, subject to part I of the Interstate Commerce Act.

(i) *Person.*—The term "person" means an individual, a partnership, an association, a joint-stock company, or a corporation.

(26 U. S. C. 1940 ed., Sec. 1532.)

SUBCHAPTER C—TAX ON EMPLOYERS OF EIGHT OR MORE

SEC. 1600. [As amended by Sec. 608 of the Social Security Act Amendments of 1939, *supra.*] RATE OF TAX.

Every employer (as defined in section 1607 (a)) shall pay for the calendar year 1939 and for each calendar year thereafter an excise tax, with respect to having individuals in his employ, equal to 3 per centum of the total wages (as defined in section 1607 (b)) paid by him during the calendar

year with respect to employment (as defined in section 1607 (c)) after December 31, 1938.
(26 U. S. C. 1940 ed., Sec. 1600.)

SEC. 1601. [As amended by Sec. 609 of the Social Security Act Amendments of 1939, *supra.*]
CREDITS AGAINST TAX.

(a) *Contributions to State Unemployment Funds.*

(1) The taxpayer may, to the extent provided in this subsection and subsection (c), credit against the tax imposed by section 1600 the amount of contributions paid by him into an unemployment fund maintained during the taxable year under the unemployment compensation law of a State which is certified for the taxable year as provided in section 1603.

* * * * *

(26 U. S. C. 1940 ed., Sec. 1601.)

SEC. 1607. [As amended by Sec. 614 of the Social Security Act Amendment of 1939, *supra.*]
DEFINITIONS.

When used in this subchapter—

(a) *Employer.*—The term "employer" does not include any person unless on each of some twenty days during the taxable year, each day being in a different calendar week, the total number of individuals who were employed by him in employment for some portion of the day (whether or not at the same moment of time) was eight or more.

(b) *Wages.*—The term "wages" means all remuneration for employment, including the cash value of all remuneration paid in any medium

other than cash; except that such term shall not include—

(1) That part of the remuneration which, after remuneration equal to $3,000 has been paid to an individual by an employer with respect to employment during any calendar year, is paid to such individual by such employer with respect to employment during such calendar year;

* * * * *

(c) *Employment.*—The term "employment" means any service performed prior to January 1, 1940, which was employment as defined in this section prior to such date, and any service, of whatever nature, performed after December 31, 1939, within the United States by an employee for the person employing him, irrespective of the citizenship or residence of either, except—

* * * * *

(9) Service performed by an individual as an employee or employee representative as defined in section 1 of the Railroad Unemployment Insurance Act;

* * * * *

(i) *Employee.*—The term "employee" includes an officer of a corporation.

* * * * *

(k) *Person.*—The term "person" means an individual, a trust or estate, a partnership, or a corporation.

* * * * *

(26 U. S. C. 1940 ed., Sec. 1607.)

SEC. 1611. [As added by Sec. 615 of the Social Security Act Amendments of 1939, *supra.*]

This subchapter may be cited as the "Federal Unemployment Tax Act."

(26 U. S. C. 1940 ed., Sec. 1611.)

The above-quoted provisions of subchapter B of Chapter 9 of the Internal Revenue Code, relating to employment by carriers, are derived from the Carriers Taxing Act of 1937, c. 405, 50 Stat. 435. The only substantive difference between the original and present provisions is that Sections 2 (a) and (3) (a) of the original act specified the rate of tax levied for the years 1937 and 1938, whereas the Code specifies the rate only for 1939 and subsequent years. Thus: Carriers Taxing Act of 1937, c. 405, 50 Stat. 435:

SEC. 2. (a) In addition to other taxes, there shall be levied, collected, and paid upon the income of every employee a tax equal to the following percentages of so much of the compensation of such employee as is not in excess of $300 for any calender month, earned by him after December 31, 1936—

1. With respect to compensation earned during the calendar years 1937, 1938, and 1939, the rate shall be 2¾ per centum;

* * * * *

(45 U. S. C. 1940 ed., Sec. 262.)

SEC. 3. (a) In addition to other taxes, every employer shall pay an excise tax, with respect to having individuals in his employ, equal to the following percentages of so much of the compensation as is not in excess of $300 for any calendar

month paid by him to any employee for services rendered to him after December 31, 1936: *Provided, however,* * * *;

1. With respect to compensation paid to employees for services rendered during the calendar years 1937, 1938, and 1939, the rate shall be 2¾ per centum;

* * * * *

(45 U. S. C. 1940 ed., Sec. 263.)

The above-quoted provisions of subchapters A and C of Chapter 9 of the Internal Revenue Code, now designated as the "Federal Insurance Contributions Act" and the "Federal Unemployment Tax Act," respectively, are derived from Sections 801, 802, 804, and 811 of Title VIII and Sections 901, 902 and 907 of Title IX of the Social Security Act. c. 531, 49 Stat. 620.

Treasury Regulations 100, promulgated under the Carriers Taxing Act of 1937:

ART. 3. *Who are employees.*—(*a*) *General.*—Within the meaning of the Act, any person is an *employee* if he is in the service of one or more employers (as defined in section 1 (a)) for compensation. An individual is in the service of an employer if he is subject to the continuing authority of the employer to supervise and direct the manner in which he renders services for compensation. It is not necessary that the employer actually direct or control the manner in which the services are performed; it is sufficient if the employer has the right to do so. The right of an employer to discharge an individual is also an important factor indicating that the individual is an employee. Other factors indicating that an

individual is an employee are the furnishing of tools and the furnishing of a place to work by the employer to the individual who performs the services. * * *

* * * * *

Whether or not an individual is an employee will be determined upon an examination of the particular facts of the case.

If an individual is an employee, it is of no consequence that he is designated as a partner, coadventurer, agent, independent contractor, or otherwise, or that he performs services on a part-time basis. The age of the individual, or the measurement, method, or designation of the remuneration, is immaterial, if he is in fact an employee.

The Act makes no distinction between classes or grades of employees. Thus, superintendents, managers, and other superior employees are employees within the meaning of the Act. An officer of an employer is an employee. A director is not an employee unless he performs services other than those required by attendance at and participation in meetings of the board of directors.

* * * * *

Treasury Regulations 106, promulgated under the Federal Insurance Contributions Act:

SEC. 402.204. *Who are employees.*—Every individual is an employee if the relationship between him and the person for whom he performs services is the legal relationship of employer and employee.

Generally such relationship exists when the person for whom services are performed has the

right to control and direct the individual who performs the services, not only as to the result to be accomplished by the work but also as to the details and means by which that result is accomplished. That is, an employee is subject to the will and control of the employer not only as to *what* shall be done but *how* it shall be done. In this connection, it is not necessary that the employer actually direct or control the manner in which the services are performed; it is sufficient if he has the right to do so. The right to discharge is also an important factor indicating that the person possessing that right is an employer. Other factors characteristic of an employer, but not necessarily present in every case, are the furnishing of tools and the furnishing of a place to work, to the individual who performs the services. * * *

* * * * *

Whether the relationship of employer and employee exists will in doubtful cases be determined upon an examination of the particular facts of each case.

If the relationship of employer and employee exists, the designation or description of the relationship by the parties as anything other than that of employer and employee is immaterial. Thus, if such relationship exists, it is of no consequence that the employee is designated as a partner, coadventurer, agent, or independent contractor.

* * * * *

No distinction is made between classes or grades of employees. Thus, superintendents, managers,

and other superior employees are employees. An officer of a corporation is an employee of the corporation but a director as such is not. A director may be an employee of the corporation, however, if he performs services for the corporation other than those required by attendance at and participation in meetings of the board of directors.

* * * * *

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